No. 30211

HOMER W. CLARK v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted February 9, 1950. Decided May 29, 1950

Demurrage charges collected at Syracuse, N. Y., on three carloads of coal shipped from mines in central Pennsylvania to Syracuse, found applicable and not shown to have been unreasonable or otherwise unlawful. Complaint dismissed.

Homer W. Clark for complainant.

Rowland L. Davis, Jr., and *John F. Reilly* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND CROSS

BY DIVISION 3:

The parties agreed to the disposition of this proceeding under the shortened procedure, thereby waiving oral hearing and cross-examination, and this procedure was followed. The parties filed exceptions to the report proposed by the examiner and the defendant replied to complainant's exceptions. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainant, an individual, alleges by complaint filed March 17, 1949, that demurrage charges collected for detention at Syracuse, N. Y., of three carloads of coal were and are inapplicable, unreasonable, unjustly discriminatory, and unduly prejudicial. We are asked to award reparation.

Complainant is engaged in the sale of coal in wholesale (carload) lots, and during the past 20 years has sold coal to the Brown-Lipe-Chapin Division of General Motors Corporation at Syracuse, hereinafter called Brown-Lipe-Chapin. During 1947, the coal industry had difficulty in supplying its customers at all times with the desired sizes, amounts, and specifications of coal. Brown-Lipe-Chapin had some difficulty in unloading and using some of the coal sold to it by complainant owing to the separation in excessive quantities of the fine (under ½ inch) from the coarse (½ inch and over) sizes, and complainant suggested that he be permitted to "treat" specially

three carloads of coal prior to delivery to Brown-Lipe-Chapin and at no extra cost in addition to the price of the coal at the mines plus the line-haul charges for delivery to the customer's plant at Syracuse.

Accordingly, three carloads of coal in cars W&LE 61061, PMcKY 62854, and PRR 145280, en route to Syracuse from mines in central Pennsylvania, were designated for this purpose, and the delivering carrier was instructed by Brown-Lipe-Chapin and the complainant to place these cars, on arrival at Syracuse, at the unloading pit of the Tobin Coal & Trucking Company, hereinafter called Tobin, on the so-called Tobin pit-dock track of the Delaware, Lackawanna and Western Railroad Company, hereinafter called defendant, instead of delivering them to the plant of Brown-Lipe-Chapin. At the same time, complainant requested defendant to place three empty cars on a track adjacent to the unloading pit and alongside the three loaded cars. The loaded and empty cars were so placed on or about March 17, 1947. Brown-Lipe-Chapin paid the in-bound freight charges on the coal, as well as the cost of the coal at the mines, but in order to avoid confusion in its receiving-traffic department, it billed Tobin for the mine cost plus the freight charges.

Acting on instructions from complainant, Tobin transferred the coal from the three in-bound cars to the three empty cars, NYC 911973, NYC 913955, and PRR 686158, and at the same time sprayed it with a sticky liquid so as to dustproof the coal and decrease the separation of the fine from the coarse sizes. Upon completion of this operation complainant, acting in the name of Tobin, instructed defendant, on March 21, 1947, to weigh the latter cars and switch them to the plant of Brown-Lipe-Chapin. Complainant paid to defendant the charges for weighing and so-called intraterminal switching, and Tobin rebilled Brown-Lipe-Chapin for the mine cost of the coal plus the in-bound line-haul freight charges.

Defendant switched the last-mentioned cars for placement on the private sidetrack at Brown-Lipe-Chapin's plant, but according to defendant the track was congested and the cars were put under constructive placement, as provided for in a rule in the governing demurrage tariff which reads as follows:

> When delivery of a car consigned or ordered to * * * other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination * * * and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement * * *

Written notice of constructive placement was sent by defendant to Brown-Lipe-Chapin at 12 noon on March 22, 1947. Defendant did

not receive advice, either oral or written, from any officer, agent, or employee of Brown-Lipe-Chapin that the latter refused to accept delivery of the cars, and neither complainant nor Tobin was notified by defendant that the cars were being held under constructive placement.

Car PRR 686158 was placed for unloading at 9 a. m. on March 28, 1947, and was unloaded and released on the same day. Cars NYC 913955 and NYC 911973 were placed for unloading at 9 a. m. on March 29 and unloaded and released at 6 p. m. on March 31 and April 1, 1947, respectively. Brown-Lipe-Chapin paid demurrage charges in the amount of $88 under the so-called average agreement, consisting of $5.50 on car PRR 686158, $16.50 on car NYC 913955,[1] and $66 on car NYC 911973. Inasmuch as complainant had agreed to pay all charges above the mine price of the coal plus the in-bound freight charges, he later reimbursed Brown-Lipe-Chapin for these demurrage charges, with the understanding that he was to have the benefit of any refund that might be obtained from the defendant.

Complainant contends that under rule 4[2] of the demurrage tariff defendant was required to give notice to either Tobin or himself of the alleged inability of defendant to make delivery of the cars at the plant of Brown-Lipe-Chapin when they were first offered for placement; that the cars must be regarded as having been refused when actual delivery could not be accomplished; and that since no notice of any kind was given Tobin or complainant, the demurrage charges should be waived under the terms of rule 8[3] of the governing tariff.

By reason of the manner in which these shipments were handled, it appears that the continuity of their movement was broken when the coal was placed for unloading on the Tobin pit-dock track, and that the subsequent intraterminal switching movement was intrastate. However, Service Order No. 653, issued by division 3 on December 16, 1946, under which these demurrage charges accrued, applied to both intrastate and interstate traffic, and this division has held that in circumstances such as those here presented the Commission has jurisdiction. *L. D. McFarland Co.* v. *Southern Pac. Co.*, 263 I. C. C. 579,

---

[1] According to defendant, an additional 48 hours of free time was allowed on this car because of frozen condition of the lading.

[2] Rule 4 provided that when carload freight is refused at destination, the railroad shall, within 24 hours (exclusive of Sundays and legal holidays) after being advised of refusal, send notice of such refusal by wire to the consignor or owner when known, or when not known, to the agent at point of shipment, who shall promptly notify the consignor, if known.

[3] Rule 8 provided that in case of failure by the railroad to send notice in accordance with the provisions of rule 4, the consignor shall not be held liable for demurrage charges after the date the notice should have been sent until 7 a. m. following the date it was actually sent, provided that if through error notice was transmitted by mail instead of by wire, the waiver of liability for demurrage charges shall terminate on the date such mailed notice was received by the consignor.

581; *Armour & Co.* v. *Atchison, T. & S. F. Ry. Co.*, 269 I. C. C. 449, 452.

Service Order No. 653 provided, among other things, that:

> When demurrage detention occurs, for which charges are or may be lawfully provided by tariffs, the demurrage charges on a gondola, open or closed hopper car, included in an average agreement, held for orders, * * * loading, or unloading shall be $2.20 per car per day or a fraction thereof for the first two (2) days; $5.50 per car per day or a fraction thereof for the third day; $11 per car per day or a fraction thereof for the fourth day; and $16.50 per car per day or a fraction thereof for each succeeding day. The $2.20 per day debit charges may be offset or reduced by accrued credits as provided in applicable demurrage tariffs; provided, however, that the $5.50 per day, $11 per day, and $16.50 per day charges may not be offset or reduced.

As shown, the cars were accepted and unloaded by Brown-Lipe-Chapin after they had been constructively placed by the defendant. It follows, therefore, that there was no refusal of the freight within the contemplation of rules 4 and 8. The purpose of those rules is to protect the consignor when the consignee refuses to accept a shipment. *Prendergast Lbr. Co.* v. *Union Pac. R. Co.*, 160 I. C. C. 173.

No evidence was submitted in support of the allegations of unreasonableness, unjust discrimination, or undue prejudice.

We find that the assailed demurrage charges were applicable and are not shown to have been unreasonable or otherwise unlawful. An order will be entered dismissing the complaint.